SUPPORT TO CRIMINAL JUSTICE REFORM IN UKRAINE

Ref. N° DGI/5/2014

COMMENTS ON THE LAW OF UKRAINE

Nº731-VII OF 16 JANUARY 2014

ON AMENDMENTS TO THE LAW OF UKRAINE "ON ELIMINATION OF NEGATIVE IMPACTS AND PREVENTION OF PROSECUTION AND PUNISHMENT OF PERSONS WITH REGARD TO THE EVENTS WHICH TOOK PLACE DURING PEACEFUL GATHERINGS"

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28 January 2014

1. These comments try to analyse the Amendments of the Law of Ukraine "On elimination of negative impacts and prevention of prosecution and punishment of persons with regard to the events which took place during peaceful gatherings", approved by the Ukrainian Parliament (Verkhovna Rada) on 16 January 2014 and which entered into force the 22th of January. The analysis is mainly focused on the compatibility of this law (hereinafter "the Amnesty law") with European standards, particularly the European Convention on Human Rights ("the European Convention") and its Protocols. It will specifically comment the impact of these laws and legal amendments on the criminal justice system and the coherence with the recent reforms of the Ukrainian criminal justice. The compliance and compatibility with the Ukrainian Law on Amnesty shall not be reviewed, as the experts have not been provided with it.

   These preliminary comments have been prepared under the auspices of the Council of Europe Project "Support to criminal justice reform in Ukraine", financed by the Danish Government, by Mr Eric Svanidze[1] and Prof. Dr. Lorena Bachmaier Winter[2], following the submission of the text of the Law on 21 January 2014. The comments are based on the English translation of the Ukrainian text of Law to be commented.

Introduction

2. Amnesty (from the Greek amnestia, oblivion) is a legislative or executive act by which a state restores those who may have committed an offense against it to the positions of innocent persons. It is the act of a government "forgetting" about criminal offenses committed by one or a group of persons, usually related to crimes considered political in nature. It is often conditioned upon a return to obedience of the law within a prescribed period. It includes more than pardon, in as much as it obliterates all legal remembrance of the offense. Amnesty is often granted to a group of people who have committed offenses against the state, such as treason, immigration violations, or desertion from the military.

3. Laws on Amnesty are an exceptional decision for not applying criminal law, which is most often used in transitional societies, after civil wars or armed conflicts to ease the path to democracy and avoid the difficulties of facing the prosecution of a high number of supporters of an old regime. These transitional societies often approve laws granting amnesty, absolving or deciding not to prosecute rules, military and other persons involved in the conflict or the dictatorship, to consolidate a fragile democracy. It is an exceptional resource to allow a kind of "new start" in applying criminal laws. The amnesty laws in transitional justice solutions are not exempt of controversy, because at the end it can be interpreted as a way of pursuing the peace at the cost of justice, giving predominance to the peace process with regard to the rights of victims. This is why generally for the acceptance of amnesty laws it needs to be accompanied with other measures of restorative justice, victim's programmes, searching the truth, promoting democracy and consolidating democracy.

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4. United Nations has prohibited amnesty for international crimes, as those crimes according to the Rome Statute of the ICC (Art. 108), requires the mandatory prosecution of war crimes, genocide and crimes against humanity. Moreover, in the context of combating impunity for ill-treatment the UN Committee Against Torture has stated that amnesties and pardons "violate the principle of non-derogability".[3]

5. There is a stringent case law of the Strasbourg Court developed on the issue of amnesties and other clemency measures with regard to serious human rights violations, in particular crimes related to violations of the right to life and prohibition of ill-treatment committed by representatives of law enforcement and other persons acting in an official capacity. The ECtHR considers that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an "effective remedy" that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible."[4]

6. The present legal amendment is not formally called "Amnesty Law", but presents the main features of amnesty laws: it exempts from criminal liability over certain offences committed by certain persons in a certain place during a certain time period. The law does not have an Explanatory Memorandum, but explains its aim only in one sentence: "This law is intended, according to the principle of humanity, to release from prosecution and punishment the individuals with regard to the mass protests in November-December 2013." It contains 8 articles, regulating the scope (Art. 1), aim (Art. 2), competence (Arts. 4 and 5), form to decide on the release or exemption of criminal liability by courts (Art. 6), compatibility with other laws (Art.7), date of entering into force and term for enforcing the law (Art. 8, one month).

Amnesty and constitutional issues

7. The Constitution of Ukraine does not define amnesty nor provides for the cases in which it might be granted. It only sets out that amnesty issues cannot be subject to referendum (Art. 74 Const.) and that "Amnesty shall be declared by a Law of Ukraine", under Art. 92 of the Constitution, when listing the matters which shall be exclusively regulated by Law of Ukraine.

8. Any form of amnesty or pardon granted by the executive or the legislative, represents an interference in the normal exercise of the judicial power: without such an interference, the judges would have applied the criminal law and its consequences, and impose a sanction to the defendant if he is found guilty, according to the rules of procedure.

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[3]General Comment N2, CAT/C/GC/2, para.5.

[4]*AbdülsametYaman*v. *Turkey*, Judgment of 2 November 2004, application no. 32446/96, para. 55. See also *Enukidze and Girgvliani*v. *Georgia*, Judgment of 26 April 2011, application no. 25091/07, para. 274.

9. The application of the criminal law corresponds to the judges. According to Art. 124. I of the Ukrainian Constitution "Justice shall be administered exclusively by the Court. Delegation of the functions of courts or appropriation of such functions by other bodies or officials shall be prohibited". A law on amnesty constitutes declaring the exemption of criminal liability of a particular person or group of persons constitutes an exception to the application of the criminal rules that correspond to the judicial power, and in that sense, it might be considered an "appropriation". Even if such "appropriation" is legal, because the law foresees it and it is done through the legal procedure, it shall only be used in exceptional cases. If the faculty of granting amnesty is use by the executive or the legislative for situations that shall be dealt by the criminal justice system, it would run counter the principle of division of powers as established in the Constitution.

10. Article 124 of the Ukrainian Constitution states an essential principle of the judicial power: the court decisions shall be mandatory. The mandatory nature of the court decisions is reiterated under Art. 129.9 of the Ukrainian Constitution. Once a criminal judgment has been rendered, and it is final, it has *res iudicata* effect. Only very exceptional reasons and under restricted conditions to correct and unjust situation allow the criminal justice system to review a judgment once it is final. The same shall apply to the power of the executive and the legislative branches to set aside the effects of judicial judgments. This justifies also the exceptional character of the amnesty law.

11. The "Amnesty Law" may be against the principle of equality in the application of the law. Article 24 of the Ukrainian Constitution states: "Citizens shall have equal constitutional rights and freedoms and shall be equal before the law. There shall be no privileges or restrictions based on race, skin colour, political, religious, and other beliefs, gender, ethnic and social origin, property status, place of residence, linguistic or other characteristics."

12. The law does not explain why persons committing for example a theft related to the mass protests will be exempt of criminal liability, and other perpetrators committing the same offence but without that relation, shall receive another treatment. The same would apply to the offence of resisting the public authority or the blocking of routes. This unequal application of the criminal law appears to attempt to one of the essential constitutional principles of democracy and the rule of law as recognized in Art. 24 of the Ukrainian Constitution.

Amnesty and criminal procedure

13. In the CPC amnesty is only mentioned with regard to the taking over of proceedings (Art. 596 CPC), the transfer of persons sentenced by Ukrainian courts to serve sentence in a foreign state (Arts. 607.7 and 608 CPC), and the contrary situation, the transfer of a person sentenced by foreign courts to Ukraine to serve the custodial sentence. These rules state that the amnesty granted in the state where the criminal sentence was rendered, will also benefit the person who has been transferred to another country for serving the sentence. No other references are included in the CPC with regard to amnesty.

14. However, the waiver of prosecution, the ending of proceedings and the release of sentenced persons based on a decision of non-judicial authorities is an exception to the principles and rules of the criminal procedure. Those principles are listed in Art. 7: rule of law, access to justice, binding nature of court rulings, and are substantiated in Arts. 8, 9 and 21. Once again, this does not mean that any law on amnesty contradicts the CPC, but what has to be underlined is its exceptional character.

Amnesty and the fight against ill-treatment

15. The initial amnesty under Law of Ukraine №712-VII of 19 December 2013, which applied only to the 'participants in protests and mass activities with regard to their actions done and decisions taken during the period from 21November 2013', raises concerns as to the unqualified scope of crimes it has been extended to. Although the legislator was evidently aware of the nature of offences and prosecutions commenced during the period in issue, such general (unqualified) amnesties should be avoided because of potential incompatibility with the a primary duty to secure the right to life, prohibition of ill-treatment and some other fundamental rights by putting in place effective criminal-law provisions to deter the commission of offences against the person by other individuals which is to be backed up by law-enforcement and judicial machinery for the prevention, suppression and punishment of breaches of relevant provisions.[5]

16. However it seems that the main purpose of introducing the present amendments through the "Amnesty law" was its extension on the law enforcement agents who might have abused powers (Art.365 CC) or caused bodily harm (Art.122 CC), or persecuted journalists (Art. 171 CC), and now will benefit from the exemption of criminal liability. It should be mentioned that under the existing legal framework (legislation and judicial practice) it is Article 365 of the Criminal Code that is used for prosecuting law enforcement officials for ill-treatment related crimes.[6]

17. It is true that the tense situation in November and December during demonstrations against government in Ukraine might be considered exceptional. However, riots, rallies, violent confrontations occur also throughout European countries, and unfortunately it is not infrequent that among peaceful demonstrators act persons or minor groups who commit violent acts and thus provoke an escalation of the violence. This situation can sometimes end up with an overreaction of the law enforcement authorities that fear that the situation might run out of control. Under such circumstances, it is not always easy to find out who provoked whom or who triggered the spiral of violence. These are difficulties that many law enforcement and criminal justice systems face, but they do and should not lead to the passing of rushed laws granting amnesty to

[5] See *Opuz v. Turkey,* Judgment of 9 June 2009, application no.33401/02, §128

[6] See the CPT's Report on the visit to Ukraine from 23 May to 3 June 2005, CPT/Inf (2006) 24, paras.24-25.

everyone. We do not have notice of such a reaction of the state authorities in any Western European country confronted with violent riots.

18. Thus, the “Amnesty law” passed by the Verkhovna Rada on 16 January 2014, will lead to impunity of many offences. Impunity attempts against the security, but also against the rule of law and the equality principle. Non-application of criminal law which leads to impunity can potentially have very serious negative consequences: loss of credibility in the system, disrespect for the law, loss of the deterrence effect, etc. In the present situation, the negative effects of non-prosecuting violent demonstrators, not only affects to the rest of the citizens that might see their right to assemble and to freedom of speech curtailed, but also have the negative effect of spreading the violence in all public gatherings. Even more dangerous is the effect of impunity on the side of public officers. Demonstrators who commit crimes should be investigated, prosecuted, and judged by an impartial and independent court.

19. Granting impunity to law enforcement officers in cases of ill-treatment, without even investigating those acts and triggering the responsibility, not only produces the negative effects we have just mentioned with regard to the protesters, but have a more grave consequence: it undermines the legitimacy and credibility of the institutions. More importantly, it could be seen as an incentive for law-enforcement officials to commit relevant crimes in future.

The text of the Law

Article 1

20. Article 1 defines the scope of application of this law: the subjects, the offences, the time, but also the effects of the law. The exemption of criminal liability is provided for “persons who are suspected or accused”, with regard to the list of offences included in this article. Apparently this way of identifying all kind of participants in the mass protests who might benefit from the “elimination of the negative impacts” of criminal law, is clear. But, it might lead to difficulties of interpretation. Does it mean that the law only applies to those who are suspects or accused at the moment the law enters into force? Only those who have received the notification of suspicion are considered suspects? The aim of the provision is to exempt from criminal liability, measures, procedure and sanctions to anyone involved in the mass protests during the indicated time period. Therefore Art.1 should not be interpreted in the sense that the law does not apply to persons who are detained, suspected or charged later for those events. But this is not absolutely clear as it stands in the English version of this law.

21. The objective scope is defined by the list of offences, as long as they are “related to the mass protests”. To benefit from the “amnesty”, who will have to proof that the offence is related to the “mass protests”. Will it be sufficient for the court or the prosecutor to have a look on the detention report, or on the place of the detention? The term “related to the mass protests” gives the court some discretionary powers in applying the exemption of criminal liability upon this law.

22. The list of offences that are covered by the amnesty is quite extensive and it refers to offences committed by protesters as well as offences that can only be committed by public officers.

23. The time limit is clearly stated, by the date of beginning (21.11. 2013) and the day of ending (26.12.2013).

24. The "amnesty" does not cover the so-called administrative offences, which may also be sanctioned with a deprivation of liberty. This seems quite inconsistent: "eliminating negative impact" of criminal procedure and criminal sanctions, but maintaining the administrative sanctions. We are not aware if the administrative sanctioning procedure is subject to discretionary initiation, and this might be the reason not to include those sanctions here, although the previous law of 19 December 2013 included a release from administrative liability.

Article 2

25. This provision expresses that the persons convicted for any of the offences stated under the previous article, shall be released: set free if they are deprived of liberty and released from other type of sanctions. The issue of the civil liability and the civil compensation for damages caused when committing the offences not mentioned here. The "release of criminal liability" under this provision, lies with the courts (Art. 4).

Article 3

26. If the criminal proceedings have been initiated, but no person has been notified as suspect, the public prosecutor is competent to close the proceedings (Art.4) and the pre-trial investigation shall be closed (Art. 5.4). Art. 5 further states which public prosecutor will be competent to close the investigation (the one supervising it).

Article 5

27. This provision states which court will decide on the exemption of criminal liability and the closing of the procedures, depending of the stage of the proceedings: the court within the territorial jurisdiction where the pre-trial investigation takes place in case of suspect; in case of defendant tried, but with no final judgment, the trial court; and for convicted, the court who rendered the judgment.

Article 6

28. The release of the suspect, defendant or convicted requires to hold a hearing or as it is stated in this article a "trial". And this "trial" can be held *in absentia*. The rules of the CPC for trials in absentia have been modified, which is subject of another expert opinion of the Council of Europe.

29. The rules of the CPC on trials should apply here, but there are still many questions that remain unclear. The release can be applied by the defendant, his representative, the defence lawyer or the public prosecutor. In case that the release is requested by the defendant and the prosecutor, should the release be granted? Can the release be adopted by an agreement between defendant and

prosecutor? Who bears the burden of proof of showing that the amnesty law is applicable to a certain defendant? How do the rules on presumption of innocence apply here? Is it enough that a person has been charged of an offence during participation of the mass protests, to be benefited from the "release" according to this law?

Article 7

30. Subsidiary application of the Criminal Code, the CPC and the "Law of Amnesty", as long as they do not conflict with the present one.

Article 8

31. Provides that the law shall enter into force in one day, and shall be implemented within one month. This means that all trials to release all the persons suspected, charged or convicted for the offences of Art. 1 "related to the mass protests" will need to be held within one month. This provision aims at speeding up the procedures of release, but it does not give preference to those who are deprived of liberty, who should be dealt immediately. It should also be considered if until the trial for the application of this law is held, the suspect, defendant or convicted deprived of liberty should be set free. This would be the approach compatible with the general provisions on alternative measures to detention and with the general approach to precautionary measures.

32. A rule on the elimination of criminal record should have been added.

33. Furthermore, there is no provision stating if the person released from criminal liability can be brought to administrative proceedings for imposing an administrative sanction.

Concluding remarks

34. As stated before, in the international criminal law practice, where classical amnesty laws in transitional societies have been applied, the measure is seen as a way of overcoming a war or an armed conflict, or a way to foster transition to democracy, because in such extreme cases of a generalised involvement of society in the conflict, the means of the criminal justice systems are not practicable, are not effective, would be too lengthy or would lead to an increased destabilising situation. In such extreme and exceptional situations it is where amnesty laws are exceptionally applied, and the waiver of justice in exchange of an expectation of a peaceful future, might be understood.

35. It is to be doubt that Ukraine is under a situation that would see the amnesty of all actors involved in riots as an appropriate solution to the conflict. Not appearing to be in a classical scenario that requires a derogation of the criminal law and the exceptional exemption of criminal law for certain acts, places and time, the appropriateness of such a measure should be questioned. To that end the negative impact over the general credibility of institutions, and in particular the criminal justice system, should be balanced against its necessity and usefulness. Instead of being useful to pacify a society, there might be the risk that the idea of impunity may boost violence and abuses.

36. This law is against the constitutional principle of equality before the law: it set out privileges that are not adequately legally justified, but seem to respond to a political negotiation, and criminal law and criminal prosecution should not be used as an exchange measure for political bargains.

37. For all those reasons, a law like the one "On elimination of negative impacts and prevention of prosecution and punishment of persons with regard to the events which took place during peaceful gatherings", entails risks that are not desirable in a democratic society.

38. Moreover, it clearly contradicts the well-established international standards, including the case-law of the ECtHR, objecting to extension of amnesties or pardons on crimes concerning ill-treatment and some other serious human rights violations.

39. More importantly, it could be seen as an indication for law-enforcement officials that if they commit serious human rights violations in future (at least in an analogous context) the state guarantees them immunity for criminal responsibility measures.

40. It is important to underline that these comments are focused on the piece of legislation commented, but we cannot disregard that the situation of the judiciary in Ukraine might not be equivalent to the position of impartiality and independence of the judiciary in other Western European countries. Moreover, taken into account the powerful position of the public prosecution service in Ukraine and extremely high rate of convictions, the "Amnesty law" might have been the less worse solution for the demonstrators. At the same time, bearing in mind already existing practice of ineffective investigations and prosecutions in respect of ill-treatment allegations, establishing additional measures for releasing public officials from criminal responsibility could encourage greater level of impunity and undermine effective prevention of such actions.

41. In sum, the political decision of promoting a general "Amnesty law" for the events that took place during the demonstrations of November and December in Ukraine is not an adequate measure within a democratic country and poses severe constitutional questions. However, country-specific conditions, which we are not able to assess here in full, might justify resorting to such an exceptional derogation of the criminal law vis-a-vis participants of the rallies and protesters. At the same time, under no condition it should be applied to serious human rights violations committed by persons acting in an official capacity.

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